No. 120

In the Supreme Court of the United States

OCTOBER TERM, 1944

DONALD L. UNDERWOOD, CORA UNDERWOOD, PAULINE UNDERWOOD, D. W. UNDERWOOD, ED. MICHALOWSKI, PETITIONERS

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (R. 227–231) is reported in 141 F. (2d) 546. The district court wrote no opinion and made no findings of fact.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1944 (R. 232). The petition for a writ of certiorari was filed on June 2, 1944. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Petitioners, five of seven locators of a placer claim for sand and gravel under the United States mining laws, sought a mandatory injunction ordering the respondent to set aside his final decision of June 14, 1940 (R. 117–122), by which, after lengthy hearings in accordance with the established quasi-judicial procedure of the Department of the Interior, the respondent held that the sand and gravel in that claim did not constitute a valuable mineral deposit. The question is whether the court of appeals was correct in holding that the respondent's decision was within the scope of his authority and was neither arbitrary nor capricious.

STATUTES INVOLVED

The provisions of the Revised Statutes under which the petitioners made their location are as follows:

> SEC. 2318. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law. (30 U. S. C., Sec. 21.)
>
> SEC. 2319. Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to ex-

ploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. (30 U. S. C., Sec. 22.)

STATEMENT

The Sand Hill claim was located by the petitioners on November 11, 1933, approximately 1½ miles north of the site of the Grand Coulee Dam on the Columbia River (R. 4, 40). The deposit of sand and gravel, according to Donald L. Underwood, the most active of the petitioners, was "visible with the eye" (R. 155). Although this location was made in accordance with the formalities required by law (R. 3–4), the respondent found that the substantive statutory requirement that the location contain a valuable mineral deposit was not satisfied. This claim is within a half-mile of the great Brett gravel pit (R. 170) from which 11 million cubic yards of sand and gravel were taken for the construction of the Grand Coulee Dam. Nevertheless, that pit was found to be worthless in a condemnation proceeding. *Brett* v. *United States,* 86 F. (2d) 305 (C. C. A. 9),

certiorari denied, 301 U. S. 682.[1] The Government became aware of the existence of the claim when the petitioners, asserting ownership of this claim, sought to intervene in the condemnation proceedings brought by it to acquire land needed in connection with the construction of the Grand Coulee Dam. The final judgment in the condemnation proceeding expressly excepted and did not affect the mineral rights, if any, of the petitioners. (R. 41–42.)

Because sand and gravel are so plentiful in the area of Grand Coulee Dam as to be worthless, and because the location had been made while the Government was negotiating with the owner of the surface of the land to purchase a part of the land, an investigation was ordered to be made. As a result of an adverse report, proceedings against the claim were ordered instituted by the Commissioner of the General Land Office on April 5, 1934. (R. 42.) The decision of the Commis-

[1] The circuit court of appeals in that case said of the Brett gravel deposit, at page 306: "There was uncontradicted testimony that the land contains from 35,000,000 to 60,000,000 cubic yards of good quality sand and gravel. However, the testimony shows that, commercially, the sand and gravel has no value, except in its use in constructing the dam. *The reason is that the cost of delivering processed gravel from the land in controversy to the nearest towns of any size where there would be a market, is six to seven times the retail price of gravel in those towns.*" [Italics supplied.]

The Government permits people to obtain gravel without charge from the part of the pit not needed for government work (R. 200).

sioner against the validity of the claim was sustained by the Secretary on appeal, on the ground that the sand and gravel were not a valuable mineral deposit since they could not be mined, removed, and disposed of at a profit, and a motion for rehearing was denied (R. 74–82, 83–85). The petitioners' request that the respondent exercise his supervisory authority was finally granted in part (R. 87–101), to enable them to substantiate their claim that the deposit had a present or prospective market value. A second hearing was had. The Commissioner found in favor of the petitioners but was reversed by the respondent because the evidence did not show that there was a demand or market for the deposit either presently or prospectively (R. 107–117). A motion for rehearing was denied (R. 117–122).[2]

The evidence upon which the respondent based his decision that the Sand Hill location did not contain a valuable mineral deposit may be summarized as follows: Petitioners had conceded that on November 11, 1933, when the notice of discovery was posted on the claim, the area of the dam and the surrounding country were wild desert land, uninhabited and unimproved, lacking sufficient population to invite the use of sand and gravel as a commercial commodity (R. 105). The only issue, therefore, was as to prospective value.

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[2] Obviously, the petitioners must be mistaken when they assert (Pet. 4, 13) that the facts were finally found by the respondent in their favor, for the opinion of the Under Secretary is plainly adverse to petitioners (R. 116).

The testimony on this point was carefully evaluated in the decisions (R. 113–115, 122). The Under Secretary concluded that the petitioners had shown only a limited market for sand and gravel in the Grand Coulee Dam area and that the deposits in question were not "either presently or prospectively valuable" at the time of the withdrawal because there was no showing that they were "so situated or * * * of such superior quality as to point to the probability that they would be sold", especially "because of the abundance, availability and free access to" other deposits in the area (R. 116).

While paragraph XVI of the complaint (R. 11–12) alleges a total production of over 40,000 cubic yards at and near Grand Coulee during a two-year period, this figure includes a duplication of 10,500 yards in connection with H. P. Dorsey's [3] production, which if eliminated leaves 31,920 cubic yards over a four-year period (R. 115). Of this amount 5,270 yards were a donation by the United States to a town which lacked funds (R. 12, 114–115), and 22,500 yards were for public work at the dam for which the sand and gravel deposit from this location was not acceptable (R. 114). This leaves only 4,150 yards of actual sales in four years which, even if valued at 10 cents per yard (R. 115), rep-

[3] Dorsey operated a sand and gravel producing plant near the Grand Coulee Dam (R. 114).

resents only an average annual sale of $103.75. The conclusion that this is a limited market is fortified by the agreement of the credible testimony on both sides as to the "abundance, availability and free access" to the sand and gravel deposits in the area of the dam (R. 111–112, 116, 200). The testimony that the state highway program offered a market was rejected because the petitioners' own witness stated that, with two minor exceptions, the Sand Hill location could not have competed with other sources because of the high cost of transportation and because gravel was available from nearby roadside pits along the construction routes (R. 112, 113). Nor did the Columbia Basin project, whose nearest boundary is 50 miles distant from Sand Hill,[4] offer a prospective market. The testimony overwhelmingly showed that the project area had more than adequate quantities of sand and gravel and that the Sand Hill claim could not compete because of the high cost of truck transportation and the absence of railroad transportation (R. 111–112).

Shortly after respondent finally declared the Sand Hill claim invalid, the petitioners instituted this suit in the district court. Upon the denial of respondent's moton to dismiss the complaint (R. 27), he filed his answer (R. 27–57), which denied

[4] The northernmost part of the area is 50 miles south of Grand Coulee Dam. Hearings, H. Com. on Irrigation and Reclamation, H. R. 6522, 77th Cong., 2d sess. (1942), p. 46.

all the material allegations of the complaint.[5] Subsequently, the petitioners' motion for summary judgment was granted (R. 123) and a motion for rehearing denied (R. 124). Judgment issued in favor of the petitioners (R. 128–129), that the Departmental determinations be set aside and the proceedings dismissed, that patents issue to the petitioners, and that the Government be enjoined from interfering with them in the removal of sand and gravel from the claim.

The court of appeals reversed the judgment of the district court (R. 232). In its opinion, the court stated the familiar rule that the judicial power will not be interposed to limit or direct the exercise of discretion by public executive officers with respect to pending matters within their jurisdiction except in clear cases of illegality of action. The court pointed out that the decision of the respondent rested upon his finding of fact that the deposits of sand and gravel were neither presently nor prospectively valuable before or at the time of the appropriation of the land for public use, that his findings have abundant support in the record and are clearly within his authority, and that the decision, since there was no showing of fraud or imposition, is conclusive.

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[5] Although the petitioners state (Pet. 3), as a fact presumably not controverted, that they had spent in excess of $5,000 in preliminary efforts (R. 3), this is denied by the answer (R. 28). Nor is there any testimony in the record that the deposit was worth $262,013.88, as claimed (Pet. 3), or any other figure.

ARGUMENT

The petitioners claim that the court of appeals held that the respondent could substitute his personal will for that of Congress and therefore the decision is in conflict with decisions of this Court that an executive officer may not act in an arbitrary and capricious manner. The opinion of the court of appeals, however, cannot be so interpreted. On the contrary, it is in accord with the many decisions of this Court that the judiciary cannot interfere either by mandamus or injunction with executive officers in the discharge of their official duties which involve the exercise of judgment and discretion, unless there is clear illegality of action. *Bates & Guild Co.* v. *Payne,* 194 U. S. 106, 108–109; *Waite* v. *Macy,* 246 U. S. 606, 608; cf. *Northwestern Co.* v. *Federal Power Commission,* 321 U. S. 119, 124.

In the application of this rule, the Secretary of the Interior does not constitute an exception. *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 324–325; *Alaska Smokeless Coal Co.* v. *Lane,* 250 U. S. 549, 555. Especially is this true, where, as in this case, he has been entrusted by Congress with the duty of disposing of a gratuity, valuable mineral deposits, by the Government. Cf. *Payne* v. *Central Pac. Ry. Co.,* 255 U. S. 228, 237. Under such circumstances, he clearly has authority to determine whether the mining location claimed by the petitioners is valid. *Cameron* v. *United States,* 252 U. S. 450, 459. The respondent, as

the supervising agent of the Government over the public lands, is best qualified to determine as a fact the known mineral character of the land. *West* v. *Standard Oil Co.*, 278 U. S. 200, 220.

The petitioners no longer deny this, but now assert, without citing the record, that although the respondent found the issues of fact in their favor (Pet. pp. 4, 13, but see fn. 2, p. 5, *supra*) he held their claim invalid because of an element of suspicion. In short, the petitioners charge that the respondent disregarded his findings of fact in making his decision. Since the record definitely contradicts the petitioner's contention that the findings of fact were in their favor, there is no foundation for the issuance of a writ of certiorari. In their complaint (R. 11, Par. XV), the petitioners state that the claim was held void on the ground that the land was non-mineral in character. The decisions of August 11, 1939, and June 14, 1940, contain findings of fact (R. 111, 122) that the deposits of sand and gravel in question were neither presently nor prospectively valuable for minerals before or at the time of the appropriation of the land for public use. Such a determination by the respondent is conclusive in the absence of fraud or imposition. *Cameron* v. *United States*, 252 U. S. 450, 464.

This Court has ruled that the test for resolving this factual question as to value is whether a person of ordinary prudence would be justified in

the further expenditure of his labor and means, with a reasonable prospect of success, in developing a paying mine. *Chrisman* v. *Miller,* 197 U. S. 313, 322; *Cameron* v. *United States, supra,* at 459. If, as in this case, the question is not as to the quantity of the low-grade non-metalliferous mineral, but as to its value, the rule uniformly has been that the proof must show that the deposit can be extracted, transported, and marketed at a profit. *United States* v. *Lillibridge,* 4 F. Supp. 204, 206 (S. D. Cal. 1932); *Opinion of the Acting Solicitor,* 54 I. D. 294 (1933); *Big Pine Mining Corporation,* 53 I. D. 410 (1931); *Layman* v. *Ellis,* 52 L. D. 714 (1929); *Gray Trust Co.,* 47 L. D. 18, 20 (1919); *Holman* v. *State of Utah,* 41 L. D. 314 (1912); Clark, Heltman & Consaul, *Mineral Law Digest* (1897), page 346. This long continued administrative construction by the department charged with the application and enforcement of the statutory provision is entitled to great weight. *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 311–315; cf. *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262, 275.

The petitioners allege arbitrary and capricious action on the part of the respondent because of portions of the decisions of August 11, 1939, and June 14, 1940 (Pet. 13–14), relating to the quantum of proof. These opinions, it is contended, imposed an unusual and additional requirement

of proof which would "revolutionize the administration of the public land laws."

The two decisions, however, are in accord with the firmly established rule that when land is sought to be taken out of the category of agricultural land, the evidence of its mineral character should be reasonably clear.[6] *Chrisman* v. *Miller,* 197 U. S. 313, 323; *United States* v. *Lillibridge,* 4 F. Supp. 204, 206 (S. D. Cal. 1932). This rule

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[6] Compare the following paragraph taken from the decision of the respondent on the first appeal (R. 80):

"The proof of marketability of the deposit should be clear and convincing in cases where the land has value for other purposes, such as for timber. *E. M. Palmer* (38 L. D. 295); *Helen V. Wells et al.* (54 L. D. 307). In the present case, the testimony shows, and furthermore the Department will take judicial notice of the fact, that at the time the claim was located the Columbia Basin Commission had entered into a contract with the United States to expend $300,000 of State money in preliminary work in connection with the Coulee Dam project; that a large number of men were on the ground employed by the Commission and the Government engaged in preliminary work, test pit exploration, examination of sand and gravel pits for construction purposes; that the Federal Emergency Administrator of Public Works had already made an allotment of $63,000,000 for the construction of the dam site, concerning which great publicity had been given. The probability that the land in question, by reason of its proximity to the dam site, would have a condemnation value might be reasonably anticipated, which renders it more incumbent upon the mineral claimants to clearly overcome the Government's evidence that the deposit is unmarketable."

is applicable whenever there is, as in this case, a non-mineral use of the land. *E. M. Palmer*, 38 L. D. 294, 298 (1909); *Helen V. Wells*, 54 I. D. 306, 309 (1933); *Austin* v. *Mann*, 56 I. D. 85, 87 (1937). Nor does the application of this rule as to the burden of proof constitute a determination based upon suspicion. In the *Wells* case, *supra*, it was said at pages 309–310:

> No bad faith is charged or proven in this case, nevertheless, the fact that the tracts in controversy contain more or less valuable timber and timber that will grow into value, supplies an additional reason for clear and convincing evidence that the land is valuable for mineral before title should pass from the United States.

CONCLUSION

The respondent's findings of fact and decision that the petitioners had not located a valuable mineral deposit are supported by substantial evidence in the record. Since there is no showing of fraud or imposition the district court was without authority to substitute its judgment for that of the respondent. Neither the decisions of the respondent nor the decision of the court of appeals are in conflict with any prior decisions of this Court relating to quasi-judicial administrative proceed-

ings or the disposition of the public lands. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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